

EXHIBIT 12

INSOLVENCY IN PRIVATE INTERNATIONAL LAW

National and International Approaches

IAN F. FLETCHER

*MA, LLM, MCL, PhD, LLD
of Lincoln's Inn, Barrister*

*Professor of Commercial Law and Director of the
Centre for Commercial Law Studies, Queen Mary and Westfield College,
University of London*

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Contracts to which the bankrupt is party

The onset of bankruptcy has a variety of consequences with respect to any contracts to which the bankrupt is a party. These include the question whether bankruptcy can have the effect of releasing the parties from their contracts, and any further consequences that ensue from this. In principle, this is a matter to be referred to the governing law of the contract itself, together with any express provisions the parties happen to have included in their agreement. A further possibility may arise if it transpires that, under the foreign law by which the contract is governed, there are provi-

sions capable of yielding some benefit for the creditors that might not be forthcoming under the rules of English law.¹⁷¹ A further occasion for investigating the governing law of the contract is where it is necessary to determine the validity or amount of any claim, whether against or on behalf of the bankrupt's estate, and where the answer is at least partly dependent upon the system of law to be applied. For such purposes, an English court will determine the governing law by applying the Rome Convention on the Law Applicable to Contractual Obligations.¹⁷² The special problem of the discharge of contractual obligations as a consequence of bankruptcy is separately considered at 2.5 and 2.7 below. For the present, we may note that in the event of any divergence between the effects generated by the governing law of the contract and those imposed by the law of bankruptcy itself, the latter will invariably prevail for the purpose of any proceedings over which the courts of the *forum concursus* have jurisdiction. Thus, the rights of a trustee in bankruptcy to disclaim onerous property (which expressly includes any onerous contract) under section 315 of the Insolvency Act, and the converse facility created by section 345 to enable a non-bankrupt party to a contract to apply to the court for an order discharging obligations thereunder in consequence of the other party's bankruptcy, can be invoked even though this may be at odds with the provisions of the governing law.¹⁷³

¹⁷¹ Cf. *Re Suse* (1887) 18 Q.B.D. 660 (CA), where it was held that the contract in question was not governed by the law of New York, whose statutory provisions appeared to confer an advantage from the creditors' point of view.

¹⁷² In force throughout the United Kingdom with effect from 1 April 1991, by virtue of the Contracts (Applicable Law) Act 1990. See *Dicey and Morris, The Conflict of Laws*, 12th edn. (1993), chs. 32, 33.

¹⁷³ For a thorough and masterly examination of the treatment of executory contracts in bankruptcy, written from the perspective of American law, see *Westbrook* (1989) 74 *Minn. L. Rev.* 227.